BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LIANE I. BLANKLEY	)	
Claimant	)	
	)	
VS.	)	
	)	
RUSSELL STOVER CANDIES, INC.	)	
Respondent	)	Docket No. **1,026,367**
	)	
AND	)	
	)	
SENTRY INSURANCE A MUTUAL CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 19, 2012, Award by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on November 6, 2012.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained her burden to prove she suffered personal injury by accident arising out of and in the course of her employment. The ALJ further found claimant was permanently and totally disabled due to her physical injury. The ALJ also found that claimant suffered no psychological impairment or disability as a consequence of her accidental injury.

Respondent argues the ALJ erred in finding claimant was permanently and totally disabled.

Claimant argues the ALJ erred in finding claimant sustained no permanent psychological impairment or disability as a result of her physical injury. Claimant requests the ALJ's Award be affirmed in all other respects.

The issues raised for the Board's review are:

1. The nature and extent of claimant's disability, including:

    a. whether, and to what extent, claimant's accident resulted in permanent impairment of function;[1]

    b. whether claimant is permanently and totally disabled; and,

    c. if not, to what extent, if any, is claimant entitled to work disability.

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties,[2] and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant was age 49 when she testified at the November 19, 2009, regular hearing. She received a high school diploma in 1978 from a school in Germany. Claimant started working for respondent on February 23, 1996. When her accident occurred on April 16, 2005,[3] claimant's job was an AFA operator, which required her to repetitively wrap boxes of chocolates in poly and paper.[4] She also had to lift 40-80 pounds 11-12 times per day. The lifting included rolls of paper and poly.[5]

Claimant alleged, and respondent stipulated, that claimant sustained compensable personal injuries to both upper extremities as a result of the repetitive work duties she performed for respondent. Respondent authorized treatment with Dr. Gary L. Harbin, an orthopedic surgeon. He diagnosed left de Quervain's tenosynovitis, which he surgically released on October 13, 2005.

---

[1] At oral argument, the parties agreed that functional impairment is an issue, although it was not addressed in the Award.

[2] In addition to considering the two preliminary hearing transcripts, the Board has also considered the preliminary hearing exhibits, based on the agreement of the parties. R.H. Trans. at 47-48.

[3] Claimant alleged a series of repetitive traumas. At the regular hearing, the parties agreed the date of accident was April 16, 2005. *Id*. at 4-5.

[4] *Id.* at 8-9; P.H. Trans. (Jun. 7, 2006) at 12-13.

[5] Harris Depo. at 5.

Claimant was released by Dr. Harbin on May 8, 2006, and the doctor's chart entry of that date stated:

> Due to her chronic tendinitis of the upper extremities, has approximately a 20% upper extremity impairment. Will not be able to work at her job at the present requirements. Patient will be maintained on permanent work restrictions as listed on 04/19/06. Patient is MMI at this point. Do not feel that any changes will occur in the future.[6]

The only item in Dr. Harbin's records dated April 19, 2006 is only partially legible, however, that document does appear to restrict claimant's lifting to 15 lbs. Dr. Harbin expressed no task loss opinion and he was not deposed. It is unclear if Dr. Harbin's rating is limited to the left upper extremity or encompasses both extremities. Dr. Harbin's rating makes no reference to the fourth edition of the AMA *Guides*[7].

Claimant suffered a myocardial infarction in January 2006[8] and, as a result, was off work for approximately one month. The myocardial infarction required angioplasty and the implantation of a pacemaker.

Claimant last performed work for respondent in April 2006. Claimant's employment with respondent was terminated after claimant used up all of her company leave and FMLA leave.

At the request of claimant's attorney, Dr. Lynn Ketchum examined claimant on May 17, 2006. Claimant told Dr. Ketchum she was experiencing extreme pain in her wrists. The doctor diagnosed bilateral de Quervain's disease. On July 28, 2006, Dr. Ketchum performed a repeat left de Quervain's release and neurolysis of the left superficial radial nerve. On August 25, 2006, Dr. Ketchum performed a right de Quervain's release. Insofar as the record reflects, Dr. Ketchum provided no opinions regarding permanent impairment, permanent restrictions, task loss, or claimant's ability to perform substantial, gainful employment. Dr. Ketchum was not deposed.

Claimant testified she continued to have pain, swelling and difficulties performing activities of daily living. She was employed part-time working at a convenience store in April, May and June 2007, earning about $7.35 per hour. Claimant quit that job because of pain and swelling in her upper extremities. Other than the work at the convenience store, claimant has not been gainfully employed since she last worked for respondent in

---

[6] P.H. Trans. (Jun. 7, 2006), Resp. Ex. 3 at 1.

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[8] Some references in the record indicate the heart attack occurred in June 2006.

April 2006. Claimant has been receiving Social Security disability benefits since January 2009. The date of disability was apparently found by the SSA to be in July 2007.[9]

Pursuant to an order entered by the ALJ, claimant was seen by Dr. Lanny Harris, an orthopedic surgeon, for a neutral medical evaluation on February 28, 2008. Dr. Harris reviewed medical records and performed a physical examination. Dr. Harris diagnosed post-right and -left de Quervain's releases with left radial sensory neurolysis.

Based on the AMA *Guides*, Dr. Harris rated claimant's permanent functional impairment at 5% to each upper extremity. Dr. Harris imposed no permanent restrictions. Dr. Harris reviewed a list of work tasks claimant performed in the 15 years preceding the date of accident. The task list, including the physical requirements associated with each task, was prepared by Michelle Sprecker, a vocational consultant retained by respondent.

Dr. Harris testified he would not restrict claimant from performing any of the 36 work tasks identified by Ms. Sprecker.

In her deposition, Ms. Sprecker was not asked directly to express an opinion about claimant's ability, from a vocational standpoint, to perform substantial, gainful employment. However, Ms. Sprecker did testify that based on the restrictions of Dr. Poppa, claimant could access and perform sedentary work in the open labor market and earn wages in the range of $290 to $310.80 per week on a full-time basis.[10] However, Ms. Sprecker admitted, again using Dr. Poppa's restrictions, claimant could not successfully perform the jobs she performed in the 15 years before her injury, and that claimant could not perform all types of sedentary work.[11]

Dr. Michael Poppa, a specialist in occupational and preventive medicine, examined claimant at his attorney's request on June 4, 2009. Dr. Poppa recorded claimant's history, reviewed medical records and performed a physical examination.

Dr. Poppa imposed permanent restrictions: (1) no repetitive gripping, grasping, manipulation, twisting or turning her wrists/forearms greater than 2 times per minute; (2) no lifting with either upper extremity greater than 2 pounds on an occasional basis; and, (3) avoid working with her arms extended away from her body.

Dr. Poppa found claimant sustained a 25% permanent impairment of function to her left forearm and a 20% permanent impairment of function to the right upper extremity at

---

[9] Lindahl Depo. at 9.

[10] Sprecker Depo. at 9.

[11] *Id*. at 12-14.

the shoulder[12] due to her work-related conditions and residuals including pain complaints. It is unclear whether Dr. Poppa based his impairment ratings on the AMA *Guides*. The versions of K.S.A. 44-510d (scheduled injuries) and K.S.A. 44-510e (whole body disabilities) in effect when this claim arose require that ratings must be based on the AMA *Guides* "if the impairment is contained therein." Dr. Poppa's June 4, 2009, narrative report states:

> The Fourth Edition AMA Guides were consulted but do not adequately address these areas. Therefore, I relied on my education, training and experience in Occupational Medicine, which is consistent with Section 1.3 on Page 3 of the Fourth Edition AMA Guides.[13]

Similarly, Dr. Poppa testified:

> I consulted the Fourth Edition AMA [G]uides on both impairments involving right and left upper extremities, however, the [G]uides are deficient or lacking as it results to chronic tendinitis, tenosynovitis, adhesions, pain complaints similar or related to those.[14]

Dr. Poppa reviewed the list of claimant's former work tasks prepared by claimant's vocational consultant, Doug Lindahl, and concluded claimant could no longer perform 25 of the 31 tasks for an 81% task loss. Dr. Poppa did not testify claimant was permanently and totally disabled.

Mr. Lindahl testified that, based on Dr. Poppa's restrictions, claimant's age, her educational level, and prior work history, claimant would be able to engage in no jobs in the open labor market.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits.[15]

---

[12] There is no evidence in the record to support Dr. Poppa's rating at the shoulder level. The evidence establishes that claimant's injuries and impairment are limited to the forearm level bilaterally.

[13] Poppa Depo., Ex. 2 at 7.

[14] *Id.* at 13.

[15] K.S.A 44-501(a).

"Burden of proof" means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[16]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

By virtue of her permanent injuries to both upper extremities, claimant has the benefit of a statutory presumption in favor of a finding of permanent total disability.[17]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[18]

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[19]

ANALYSIS

The Board finds the Award should be affirmed as modified by the Board's determination of claimant's functional impairment.

The ALJ's findings of fact and conclusions of law concerning claimant's allegations of psychological or psychiatric injury are hereby fully adopted by the Board as though specifically set forth in this Order. The Board agrees that claimant did not sustain her burden to prove that her psychological or psychiatric issues were a consequence of her upper extremity injuries. It would serve no purpose to duplicate the ALJ's findings and conclusions on this issue.

---

[16] K.S.A. 44-508(g).

[17] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[18] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[19] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

The issue of the nature and extent of claimant's disability requires some discussion.

It is respondent's burden to introduce evidence sufficient to overcome the rebuttable presumption that claimant is permanently and totally disabled. The Board's review of the record reveals there is some reason to question the credibility of all of the witnesses who testified about claimant's ability, from the standpoint of her physical injuries, to perform substantial, gainful employment.

Claimant sustained significant injuries to her upper extremities. The injuries required two de Quervain's releases, and left radial neurolysis, to the left forearm, and one de Quervain's release to the right forearm. Claimant testified in essence she cannot perform any work due to her continuing symptoms. However, if the court appointed physician, Dr. Lanny Harris, a board certified orthopedic surgeon with much experience, is to be believed, then claimant needs no permanent restrictions and did not suffer any task loss as a consequence of her upper extremity injuries. If accepted as accurate, Dr. Harris' opinions cast doubt on the accuracy of claimant's disabling symptoms.

Dr. Harris was not specifically asked if claimant could perform substantial, gainful employment. However, it seems a reasonable inference from Dr. Harris' testimony that he likely would not limit claimant's ability to perform any work.

If, however, claimant's testimony is accurate, then the credibility of Dr. Harris' opinions may be substantially impaired.

Moreover, Dr. Poppa's opinions are also arguably less than completely credible. If Dr. Harris' opinions are found credible, then Dr. Poppa's opinions seem extreme and excessive. Regarding functional impairment, Dr. Harris testified he based his impairment ratings on the AMA *Guides* and he specified the parts of the AMA *Guides* on which he relied in determining his ratings. However, Dr. Poppa admitted he only considered the AMA *Guides*, but did not use them as a basis for his ratings because he felt the AMA *Guides* were inaccurate, deficient or lacking. However, under the Act, a rating physician is not free to ignore the AMA *Guides* because he or she finds them to be inadequate or deficient. Under the law which applies to this claim, all ratings shall be based on the AMA *Guides* if the impairment is contained therein.

Dr. Poppa did not testify claimant's impairment cannot be determined under the AMA *Guides*. Rather, Dr. Poppa strayed from the requirements of the AMA *Guides* because the ratings were less than Dr. Poppa thought they should be. Dr. Poppa's conception of whether ratings based on the AMA Guides are insufficient is not a legitimate reason to abandon the requirements of the AMA *Guides*.

Dr. Poppa's restrictions, and his consequent task loss opinion of 81%, likewise seem excessive under the circumstances of this claim. Dr. Poppa's imposition of a restriction of no occasional lifting over two pounds is particularly troublesome.

On the other hand, the credibility of Dr. Poppa's opinions are bolstered, at least to some extent, by the reference to a 15-pound permanent lifting restriction in the records of Dr. Harbin, the surgeon who performed claimant's first de Quervain's release. The agreement of Drs. Harbin and Poppa that claimant should be significantly restricted, at least in terms of lifting, casts doubt on Dr. Harris' conclusions about the extent to which claimant is able to perform work activity.

The vocational evidence is also in conflict. Ms. Sprecker, who was not asked directly whether claimant was permanently totally disabled, she did testify that claimant could perform sedentary work in the open labor market. However, she admitted claimant could perform none of the jobs she did in the 15-year period preceding her injuries.[20] Ms. Sprecker also admitted that claimant, under Dr. Poppa's restrictions, could not perform all types of sedentary work.[21]

The Board finds most credible the vocational testimony of Mr. Lindahl. He testified that considering claimant's age, education, work experience and Dr. Poppa's restrictions, claimant could not perform work in the open labor market. Mr. Lindahl's testimony, although based on Dr. Poppa's restrictions, which as noted above are subject to some concern regarding credibility, is entitled to more weight than Ms. Specker's testimony. The credibility of the restrictions of Dr. Poppa and Mr Lindahl's opinions are boosted somewhat by the records of Dr. Harbin.

The Board considers this a close case. However, weighing the testimony and other evidence in the record, the Board finds respondent did not introduce evidence sufficient to overcome the presumption of permanent total disability. The preponderance of the evidence establishes claimant is essentially and realistically unemployable and is entitled to compensation based on a permanent total disability.

The ALJ did not address claimant's functional impairment. The Board finds that claimant sustained a 5% permanent functional impairment to each forearm as a result of the injuries in this claim.

CONCLUSIONS OF LAW

The Board finds:

1. As a result of the injuries sustained in this claim, claimant has a 5% permanent impairment of function to each forearm.

---

[20] In the 15 years before the date of accident, claimant worked for only two employers: 1) for respondent, in several production line positions, and 2) for the Shamrock Café as a waitress. Lindahl Depo., Ex. 2.

[21] Sprecker Depo. at 12,14.

2. Claimant is permanently and totally disabled.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[22] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Rebecca A. Sanders dated June 19, 2012, is affirmed as modified.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENTING OPINION

The undersigned Board Members respectfully dissent from the majority ruling that claimant sustained a permanent and total disability arising out of and in the course of her employment with respondent. The respondent successfully rebutted the presumption of permanent total disability through Dr. Harris. It is puzzling why the ALJ ordered an independent medical evaluation with Dr. Harris and then disregarded his findings regarding permanent restrictions.

[22] K.S.A. 44-555c(k).

In order to make a finding of permanent total disability, the ALJ relies upon vocational opinions using the restrictions of Dr. Poppa. We agree with the majority that Dr. Poppa's opinions are arguably less than credible. The undersigned find Dr. Poppa's occasional two-pound restriction to be unrealistic. As such, any vocational opinion of claimant's employability, based upon Dr. Poppa's restrictions, should be given little or no weight. ALJ Sanders award should be reversed with a finding the claimant suffers from a 5% impairment to each upper extremity and is not permanently and totally disabled.

_____
BOARD MEMBER

_____
BOARD MEMBER

e: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com
Brenden Webb, Attorney for Respondent and its Insurance Carrier,
bwebb@hdwlawfirm.com
Rebecca A. Sanders, ALJ